



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Enforcement Policy Respecting Sources Complying
With Clean Air Act Requirements By Shutdown

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TO: Air and Waste Management Division Directors
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Regional Counsels
Regions I-X

Attached is a memorandum providing guidance for your use in addressing sources that intend to comply with Clean Air Act requirements by shutting down. The relationship of this policy statement to previous policy statements on the same subject is as follows.

On June 18, 1979, the Administrator established an enforcement policy under the Clean Air and Clean Water Acts respecting sources intending to come into compliance by shutting down. (See Administrator's Memorandum of June 18, 1979, "Limited Life Facilities--Policy Statement.") On September 20, 1982 and January 12, 1983, EPA affirmed that the "Limited Life Facilities" policy would apply beyond the end of 1982 under the Clean Air Act for noncomplying sources in primary nonattainment areas where attainment was to have been achieved by the end of 1982. (See the Administrator's Memorandum of September 20, 1982,

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"Enforcement Action Against Stationary Air Sources Which Will Not Be In Compliance by December 31, 1982," and the January 12, 1983 Memorandum, "Guidance on Implementation of the 1982 Deadline Enforcement Policy Issued September 20, 1982," issued jointly by the Associate Administrator and General Counsel and the Assistant Administrator for Air, Noise and Radiation.)

For Clean Air Act sources, the present policy, "Clean Air Act Enforcement Policy Respecting Sources Complying By Shutdown," supersedes the enforcement policy issued by the Administrator on June 18, 1979 entitled "Limited Life Facilities-Policy Statement." A memorandum amending relevant portions of the September 20, 1982 and January 12, 1983 memoranda to make them consistent with today's policy statement is being issued along with this memorandum.

Attachment

ENFORCEMENT POLICY RESPECTING SOURCES COMPLYING
WITH CLEAN AIR ACT REQUIREMENTS BY SHUTDOWN

NOTE: THE POLICIES ESTABLISHED IN THIS DOCUMENT ARE INTENDED SOLELY FOR THE GUIDANCE OF GOVERNMENT PERSONNEL AND ARE NOT INTENDED TO CREATE ANY RIGHTS, SUBSTANTIVE OR PROCEDURAL, ENFORCEABLE BY A PARTY IN LITIGATION WITH THE UNITED STATES. THE AGENCY RESERVES THE RIGHT TO ACT AT VARIANCE WITH THESE POLICIES AND TO CHANGE THEM AT ANY TIME WITHOUT PUBLIC NOTICE.

I. Applicability

This policy applies to all sources which are in violation of Clean Air Act SIP, NSPS, or NESHAP's requirements, where the owner intends to achieve compliance by shutting down the source rather than by installing controls.¹ The policy applies to sources in all air quality regions, regardless of attainment status.

II. Enforcement Policy For Sources Complying by Shutdown

Section 113 of the Clean Air Act authorizes EPA to seek injunctions against sources in violation of Clean Air Act requirements. When applying to the court for a compliance schedule or when negotiating one with a defendant, EPA has consistently interpreted the Act as requiring compliance as expeditiously as practicable.

In cases where the owner intends to achieve compliance by shutting down the source, the question arises as to what constitutes an expeditious compliance schedule. EPA believes that there are two fundamental types of shutdown situations, with a different treatment being appropriate for each.

A. NESHAP Sources, NSPS Sources, and SIP Sources Not Being Replaced

Where a source is violating NESHAP or NSPS requirements, or is violating SIP requirements and is not to be expeditiously replaced (as discussed below), EPA believes that the Clean

¹ As used herein, the phrase "install controls" includes: (1) the replacement, or upgrading, of inadequate previously-installed controls; and (2) process changes involving significant developmental costs. An example of the latter class of cases would be product reformulation in the case of VOC sources. Where developmental costs can be recouped at other sources owned by the source owner, Section II.B will not be applicable, however.

Air Act requires an expeditious shutdown of the violating source. Allowing sources violating NESHAP, NSPS, PSD or NSR requirements to operate more than a minimal amount of time without controls would subvert the environmental purposes behind the Act's requirements pertaining to such sources. Moreover, allowing such sources or any other SIP sources which will not be controlled more than a minimal period of uncontrolled operation would merely afford the owner an opportunity to maximize profits at the expense of the environment.

How expeditiously sources falling into the above categories must shut down is to be determined on a case-by-case basis. The most important factors to be considered are legal restraints on closing, such as union agreements and bankruptcy court orders. As necessary in appropriate cases, EPA should apply to the relevant legal authorities for removal of any such constraints. In NESHAPs cases or in any other cases involving a significant public health risk, violating sources must be shut down as quickly as possible.

For sources subject to this Subsection (II.A), the period within which expeditious shutdown must occur runs from the time at which it is determined that the owner intends to comply by shutdown. EPA should apply to the appropriate court for injunctive relief if an acceptable expeditious shutdown schedule cannot be speedily negotiated. Any negotiated schedule should be memorialized in a judicially enforceable consent agreement and lodged with the appropriate court.

B. Possible Extensions for Noncomplying SIP Sources Which Will Be Replaced

If the owner intends to replace a source violating a SIP requirement by transferring the production to some other facility in the same geographical area², and the replacement source is not yet constructed and/or operable, EPA may exercise its enforcement discretion to delay shutdown of the violating source until the replacement facility is constructed and operable. The factors that EPA will take into account in determining whether to exercise such discretion will include:

1. The attainment status of the air quality region in which the source is located, including whether the region's deadline for achieving the NAAQS has passed,

²If the replacement source were not located in the same area as the violating source, the benefits of the extended shutdown schedule would be reaped by some community other than the one carrying the environmental burden of the extended period of noncomplying operation.

2. The impact of the violating source's excess emissions on the air quality of the region,
3. The time elapsed since the source was required to have achieved compliance, and the efforts which the source owner has made to achieve compliance,
4. The impact on workers and the company of any disruption in production which might be occasioned by a shutdown prior to the replacement source's being operable, and
5. The owner's record of compliance with all environmental regulations at the affected facility, and at other facilities owned by the same owner.
6. Shutdown of the violating source need not consist of physically destroying or dismantling the source. However, in cases where the source owner does not wish to destroy or dismantle the source, a responsible official of the source owner must submit an affidavit specifying that the owner does not, at the time the affidavit is given, intend to resume operating the source within at least three years following shutdown.

The replacement facility need not be a one-for-one replication of the violating facility but it must involve some substantial construction necessary to permit the transfer of production to the replacement facility. The replacement facility need not emit the same pollutant as the violating source. The replacement facility may include a pre-existing source, provided some substantial construction is necessary to make the transfer of production feasible. Finally, for the purposes of this paragraph, the installation or upgrading of controls at the replacement facility may constitute construction provided the installation or upgrading is necessary for the replacement facility to achieve or maintain compliance after the production is transferred.

In cases where EPA decides to exercise its enforcement discretion to delay shutdown until the replacement of the violating source, the owner must enter into a judicially enforceable consent decree providing as follows:

1. The consent decree must require shutdown of the violating source by a date certain. This date must be no later than the earliest date by which the replacement facility can be constructed and rendered operable on an

expeditious schedule, as measured from the time when it is determined that the owner of the source intends to achieve compliance by shutdown.

2. The decree must require the posting of a surety bond or equivalent mechanism providing for an automatic forfeiture in the event shutdown does not occur by the agreed-upon date. The bond should be in an amount representing the cost of installing adequate controls on the violating source.
3. Notwithstanding the provision of a bond, the decree must contain a clause reserving the government's right to seek other relief in the event the source fails to be timely shut down.
4. The decree must contain a stipulated penalty provision setting a daily penalty for any operation of the violating source beyond the shutdown date. The amount of this penalty should be sufficient to, at a minimum, recapture any economic benefit attributable to the noncomplying operation, above and beyond the capital cost of controls forfeitable pursuant to the bond required by Subparagraph 2 above.
5. The consent decree must provide that the violating source will be either demolished or dismantled, or that, upon any reactivation for a business reason arising after the shutdown, the source would constitute a new source under applicable federal regulations including, where applicable, new source review regulations.
6. All agreements regarding shutdown must be made binding on all successors-in-interest to the owner.
7. The consent decree must require a schedule of construction for the replacement facility with appropriate interim dates and stipulated penalties for any violations of the construction schedule.
8. The decree must require the owner to demonstrate and maintain compliance with all emission standards applicable to all emission points at the replacement facility which are associated with the transferred production. The compliance demonstration should, if feasible, occur prior to the transfer of production. An exception can be made in cases where a brief shakedown period is required, or where conditions prior to the transfer of production would not constitute representative operating conditions. The decree should provide that compliance shall be maintained at the replacement facility until

the termination of the decree, if that date occurs later than the date of the required compliance demonstration.

9. The decree should provide that the company shall comply with the terms and conditions of any state, local, or federal permits applicable to the sources associated with the transferred production at the replacement facility.
10. The decree must require implementation of appropriate interim measures at the violating facility to minimize the impact of continued noncomplying operation on the environment. If the violating source is uncontrolled, the decree must require implementation of whatever operation and maintenance practices are appropriate. If the source already has controls, the decree must at a minimum require the best practicable operation and maintenance of those controls until the time of shutdown.³ In cases where an appropriate limit can be set, the decree must require compliance with interim emissions limits, as a tool for ensuring compliance with interim operation and maintenance procedures, and must provide for stipulated penalties for violations of such interim emission limits.
11. The decree must contain reporting requirements regarding such matters as increments of progress in compliance schedules, implementation of interim control measures, and compliance with interim emissions levels.
12. The decree must provide, in accordance with the applicable civil penalty policy, for the payment of a civil penalty respecting the violations at the violating source, and respecting any violations at the replacement source. The penalty must cover the period beginning at the date of the earliest provable violation to the date that compliance will be achieved. The end of this period for the violating source being closed down will be the date of shutdown. The end date with respect to any noncomplying replacement source is the date that a successful compliance demonstration is conducted.
13. The termination clause of the decree must provide that the jurisdiction of the court will continue until the later of the shutdown of the violating facility or the compliance demonstration at the replacement facility.

³There have been occasions when control equipment was available on a rental basis. In any such cases, use of the rental equipment should be required.

C. Avoiding Abuse of This Policy

Experience has shown that some source owners may seek to obtain shutdown schedules longer than otherwise allowed under this policy by delaying to acknowledge that shutdown is contemplated for a source which has become the subject of an enforcement action. In order to avoid such abuse of the shutdown policy, the following procedures should be employed:

1. At the time of EPA's initial contact with the source owner subsequent to issuance of an N.O.V., EPA should routinely advise the source owner of the policy respecting sources complying by shutdown.
2. If the owner acknowledges in a timely fashion that shutdown is a possibility for the source, but indicates that the shutdown decision has not been finalized, EPA may, in appropriate cases, exercise its discretion to afford the owner a brief period to complete any decision-making regarding whether the source will be shut down and, if so, whether it will be replaced within the meaning of Section II.B. The amount of time afforded should be the absolute minimum procedurally necessary for authorized officials of the source's owner to make the relevant decisions.

III. Effective Date

This policy applies to all cases referred to Headquarters or, in the case of direct referrals, to DOJ, subsequent to December 15, 1985.